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11 Attorneys for Plaintiff JENS ERIK SORESENSEN,
12 as Trustee of SORESENSEN RESEARCH AND
13 DEVELOPMENT TRUST

14 UNITED STATES DISTRICT COURT
15 FOR THE NORTHERN DISTRICT OF CALIFORNIA
16 SAN JOSE DIVISION

17 JENS ERIK SORESENSEN, as Trustee of
18 SORESENSEN RESEARCH AND
19 DEVELOPMENT TRUST,

20 Plaintiff

21 v.

22 LEXAR MEDIA, INC., a Delaware
23 Corporation; and DOES 1 – 100,

24 Defendants.

) Case No. 08 CV 00095 JW

)

) **DECLARATION OF EDWARD**

) **TRUITT IN SUPPORT OF**

) **PLAINTIFF'S MOTION FOR**

) **APPLICATION OF 35 U.S.C. § 295**

) **PRESUMPTION OF**

) **INFRINGEMENT**

)

) Date: June 9, 2008

) Time: 9:00 A.M.

) Courtroom 8, 4th Floor

) Judge: The Hon. James Ware

)

) *Oral Argument is Respectfully Requested*

) *at Hearing on This Matter.*

)

1 I, EDWARD TRUITT, declare:

2 1. I am not a party to the present action. I am over the age of eighteen. I
3 have personal knowledge of the facts contained within the following paragraphs, and
4 could and would competently testify thereto if called as a witness in a court of law.

5 2. At all times relevant herein I have been an attorney conducting research
6 on a contractual basis for counsel to Sorensen Research and Development Trust
7 (“SRDT”), Plaintiff in the above-captioned matter.

8 3. This declaration is made in support of Plaintiff’s Motion for Application
9 of 35 U.S.C. § 295 Presumption of Infringement.

10 4. I recently conducted extensive research on the factual and legal aspects
11 of conducting discovery of Chinese nationals and Chinese companies in U.S. courts.
12 My research revealed the following:

13 5. Two agreements govern the ability of the U.S. courts to compel
14 discovery including depositions in China. Neither agreement provides an avenue for
15 reasonable discovery in this matter.

16 6. Article 27(1) of the U.S.-China Consular Convention of 1980 allows
17 consular officers of either nation to take and witness statements and testimony for
18 use in connection with a legal proceeding of either nation; 33 U.S.T. 3048. China
19 clarified this Convention in a series of diplomatic notes from the Chinese Ministry of
20 Foreign Affairs to the U.S. Embassy in Beijing. The Chinese government stated that
21 depositions under oath may only be taken by a U.S. Consular official or foreign
22 attorney if, and only if, Beijing first gives express permission after receiving a letter
23 rogatory through the Bureau of International Judicial Assistance of the Ministry of
24 Justice of the People's Republic of China. (Diplomatic Note No. 106 dated 6
25 November 1981, Diplomatic Note No. 88 dated 11 September, and Diplomatic Note
26 No. 77 dated 11 September 1996).

27 7. On only one occasion has the Chinese government ever granted
28 permission for a limited deposition. *United States v. Leung Pak Lun, et al* CR 88

1 0214-WHO. In connection with this one deposition, China informed the U.S.
2 government that the grant of permission should not be construed as precedent.

3 8. The second agreement governing discovery in China is The Hague
4 Conference on Private International Law Convention on the Taking of Evidence
5 Abroad in Civil or Commercial Matters. Upon China's accession to The Hague
6 Evidence Convention, China declared that the provisions of Chapter II of the
7 Convention except for Article 15 will not be applicable; China means that diplomatic
8 and consular officers may take evidence without compulsion of nationals of the
9 United States, only with express permission given upon application to the Chinese
10 government. See Dept of State, *China Judicial Assistance*, available at
11 http://travel.state.gov/law/info/judicial/judicial_694.html. No depositions have ever
12 been allowed under this Convention. Further, it is not possible for any U.S. Court to
13 compel production of evidence thereby. *Id.* Attached as Exhibit A.

14 9. The Chinese strictly guard the laws on administering and swearing of
15 oaths. This makes voluntary depositions between private parties both very difficult
16 and a criminal act. When foreign attorneys or consular officials administer an
17 unauthorized oath in China, the penalties include arrest, detention, expulsion, or
18 deportation of all participants in the oath. ([http://travel.state.gov/law/info/](http://travel.state.gov/law/info/judicial/judicial_694.html)
19 [judicial/judicial_694.html](http://travel.state.gov/law/info/judicial/judicial_694.html)). Attached as Exhibit B.

20 10. In *Popular Imports, Inc. v. Wong's Intern., Inc.*, 166 F.R.D. 276
21 (E.D.N.Y. 1996) the court upheld the admissibility of depositions taken in China,
22 without the use of letters rogatory. However, this was only because the issue of
23 legality had not been raised prior to the depositions and was deemed waived:

24 Had plaintiff raised this issue prior to the taking of the depositions, and
25 had the Court concluded that the procedures proposed would in fact
26 have violated Chinese law, the Court would of course have been loathe
27 to authorize procedures that would have put counsel at risk and might
28 well have generated diplomatic friction.

1 *Id. at 279.*

2 11. U.S. judgments cannot and will not be enforced in China. Chinese law
3 requires the existence of a treaty or de facto reciprocity in order to enforce a foreign
4 judgment. Neither of this exists between the United States and China.

5 12. Research reveals specific cases in which enforcement was refused and
6 no cases in which enforcement was granted. *See* Clarke, Donald C., "The
7 Enforcement of United States Court Judgments in China: A Research Note" (May
8 27, 2004). GWU Legal Studies Research Paper No. 236 Available at SSRN:
9 <http://ssrn.com/abstract=943922>.

10
11 I declare under penalty of perjury under the laws of the United States of
12 America that the foregoing paragraphs are true and correct to the best of my own
13 personal knowledge.

14 DATED this Thursday, April 10, 2008.

15
16
17 /s/ Edward Truitt
Edward Truitt, Esq.

